Supreme Court, U.S.
FILED
041180 FEB 15 2005
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

LEO ROGER AND DARLENE DUGAS

Petitioner(s)

v.

CLARON CORPORATION, INC.

Respondent

On Petition For Writ of Certiorari
To The United States Court of Appeals
For the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Leo Rogers Dugas, pro se
15311 Hummingbird
Baytown, TX 77520
Tel. (281) 385-2319

QUESTION(S) PRESENTED

This Court in Standard Oil Co. of Cal. v. United States, 429 U.S. 17 (1976) and Stone v. INS., 115 S.Ct. 1537 (1995) has placed an undue burden upon your petitioners. Where, the courts below have attempted to apply these cases to Rule 60(b) motions filed during the pendency of an appeal.

Title 28 U.S.C. § 2106 places upon this Court and other reviewing courts, District Courts under Bankruptcy Rule 8013, jurisdiction over the order or decree placed before it by way of a Notice of Appeal, or some Writ, *Griggs,* 459 U.S. 56 (1982), and:

Question No. 1:

Absent the language of 28 U.S.C. § 2106 and/or Bankruptcy Rule 8013 in a decision by the District Court setting in its appellant role, does the Bankruptcy Court, post-dismissal of that appeal, see **Appendix D** *Order Dismissing a Bankruptcy Appeal*, have jurisdiction to grant a Rule 60(b) motion filed during the pendency of that appeal?

Question No. 2:

Absent clear procedure from this Court in deciding a Civil Rule 60(b) motion filed during the pendency of an appeal, some lower courts have applied Criminal Rule 33's procedure as set forth in *Cronic*, 466 U.S. 667 at n.42 in their opinions. Therefore, (applying *Griggs*) can a trial court grant a Rule 60(b) motion as set out in *Stone,* 115 S.Ct. 1537, 1547 (1995) at anytime during an appeal, or, does *Cronic's* Criminal Rule 33's procedure run parallel with a Civil Rule 60(b) motion filed during an appeal?

LIST OF PARTIES

The parties to this case besides your petitioners are:

Claron Corporation, Inc.
Represented by:

Glendon B. Adams
12999 Murphy Road
Suite M-3
Stafford, TX 77477
Tel. (281) 933-7188
Fax (281) 933-7189

TABLE OF CONTENTS

	Page
QUESTION(S) PRESENTED	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	iii
AUTHORITES	iv
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISION INVOLVED	1
STATEMENT OF THE CASE	2
REASON FOR GRANTING WRIT OF CERTIORAI	5
ARGUMENT	6
CONCLUSION	9
INDEX TO APPENDICES	10

AUTHORITES

Page

Boyko v. Anderson, 185 F.3d 672 (7th Cir. 1999) . . 5

Griggs v. Provident Consumer Discount Co.,
459 U.S. 56 (1982) 6

Heckler v. Mathews, 465 U.S. 728 (1984) 7

Realty Acceptance Corporation v. Montgomery,
284 U.S. 547 (1932) 7

Scott v. Younger, 739 F.2d 1464 (9th Cir. 1983) . . . 5

SEC v. Johnston, 143 F.3d 260 (6th Cir. 1998) . . . 5

Shepard v. International Paper,
372 F.3d 326 (5th Cir. 2004) 5

United States v. Munsingwear, Inc.,
340 U.S. 36, 40-41 (1950) 8

United States v. Cronic, 466 U.S. 648 (1984) 9

Walling v. James V. Reuter, Inc.,
321 U.S. 671 (1944) 8

Winchester v. United States Attorney,
68 F.3d 947 (5th Cir. 1995) 4

Title 28 U.S.C. § 1254(1) 1
Title 28 U.S.C. § 2101(c) 1
Title 28 U.S.C. § 2601 2
Bankruptcy Rules of Appellant Procedure 8013 . . . 2
Federal Rules of Civil Procedure, Rule 60(b) 2

PETITION FOR WRIT OF CERTIORARI

Petitioners, Leo and Darlene Dugas, pro se, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Fifth Circuit is unpublished and is reproduced in Appendix A and the denial for request for rehearing is unpublished and is reproduced in Appendix B.

JURISDICTION

This Court has jurisdiction to hear this Petition for Writ of Certiorari pursuant to Title 28 U.S.C. § 1254(1). Where, the date of the Fifth Circuit mandate is dated October 19, 2004 and the Request for Rehearing was DENIED and filed on November 19, 2004 and this petition has been filed within the 90 days as prescribed by 28 U.S.C. § 2101(c).

STATUTORY PROVISION INVOLVED

The statutory provision and rules asserted by your Petitioners are as follows:

1. Title 28 U.S.C. § 2601: The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

2. Bankruptcy Rules of Appellant Procedure, Rule 8013: On appeal the district court or bankruptcy appellant panel may affirm, modify, or reverse a bankruptcy judge's judgment, order, or decree or remand with instructions for further proceedings. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witness.

3. Federal Rules of Civil Procedure Rule 60:
(b) Mistakes, Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. ....(4) the judgment is void.

STATEMENT OF THE CASE

The gravamen of this case is the timing of the granting of respondents Rule 60(b) motion. Where, it is uncontested that respondent's Rule 60(b) motion was

filed during the appeals process and not after its competition. Wherein, the bankruptcy court (citing the Fifth Circuit's ruling in *Winchester* (App. E page 2)) granted respondent's Rule 60(b) motion after the district court dismissed respondents' appeal without (1) reversing or vacating the order appealed and (2) without any instructions by the district court to the bankruptcy court for further proceedings.

The mandate by the district court was dismissal and not remand with instructions. Petitioners then appealed the bankruptcy court's ruling and the district court upheld the decision of the bankruptcy court and your Petitioners moved the district court to vacate its decision as being void, as per *Winchester,* for lack of jurisdiction. However, the Fifth Circuit, in the case now before this Court, viewed the dismissal as one of remand even absent the statutory language of 28 U.S.C. § 2106 and/or Bankruptcy Rule 8013 and petitioners have timely filed this their Writ of Certiorari.

A. Factual Background:

On March 03, 1999 the Fifth Circuit issued its mandate (App. C), thereafter the bankruptcy court *sua sponte* reopened the petitioners bankruptcy case (Discharge was January 27, 1997). Respondents failed to appear at the hearing set by the bankruptcy court and the bankruptcy court issued its judgment on the Fifth Circuit's mandate on August 24, 2001(App. E page 1). Respondent appealed the August 24, 2001 judgment and this appeal was dismissed on May 28, 2002 (App. D).

However, during this appeal Respondent filed a Rule 60(b) motion raising issues that were earlier remanded to state court in the combined *Howell* and *Searcy* adversaries (App. C page 4-5). Respondent did not appeal the dismissal of its appeal (App. D) and this *Order Dismissing a Bankruptcy Appeal* has yet to be set aside.

Some 90 days later on August 27, 2002 (App. E) the bankruptcy court *sua sponte* granted Respondents Rule 60(b) motion citing the Fifth Circuits ruling in Winchester v. United States Attorney, 68 F.3d 947 (5th Cir. 1995) (App. E page 2). Because, *Winchester* does not prescribe the granting of a Rule 60(b), except for the granting of leave by the reviewing court, your Petitioners appealed.

On July 28, 2003 (App. F) the district court upheld the bankruptcy court's granting of the Rule 60(b) motion that was filed during the appeals process. Petitioners then moved the Fifth Circuit, via mandamus, to have both the bankruptcy court and the district court to conform to the binding precedent of *Winchester* and the Fifth Circuit denied Petitioner's request.

On December 3, 2003 your Petitioners moved the district court via Rule 60(b)(4) to reopen (App. F) and vacate same as void. On April 13, 2004, the district court denied Petitioners Rule 60(b)(4) motion and your Petitioners appealed.

On October 19, 2004 the Fifth Circuit (App. A, page 4) opined that the *Order Dismissing a Bankruptcy Appeal* (App. D) was in effect an order of remand and conversely upheld the bankruptcy court and the district court's ruling that a Rule 60(b) motion filed during the appeals process could be summarily granted at anytime after the dismissal of an appeal, even without instructions by the reviewing court (App. D) to do so.

On November 19, 2004 the Fifth Circuit (App. B) denied your Petitioner's request for rehearing and thereafter your Petitioners timely filed this, their Writ of Certiorari.

REASONS FOR GRANTING THE PETITION

Petitioner's Question No. 1 stems from the trial court's jurisdiction to grant a motion filed in the trial court during an appeal and then thereafter granting this selfsame motion after the appeals process has been completed, and done without instruction by the appellant court to do so. Therefore, your Petitioners respectfully request that their writ of certiorari be granted so as:

I. To Resolve the Conflict among the United States Court of Appeals on dealing with a Rule 60(b) motion filed during an Appeal.

The **Fifth Circuit** in, Shepard v. International Paper, 372 F.3d 326 (5th Cir. 2004), states its position on how it rules on a Rule 60(b) motion filed more than ten days after a final decision has been reached and during the appeals process.

However, the **Ninth Circuit** in Scott v. Younger, 739 F.2d 1464, 1466 (9th Cir. 1983) does not allow the hearing of a Rule 60(b) motion during the appeals process, also see SEC v. Johnston, 143 F.3d 260, 263 (6th Cir. 1998), quoted in *Boyko.*

The **Seventh Circuit** in Boyko v. Anderson, 185 F.3d 672 (7th Cir. 1999) does follow the **Fifth Circuit** except does not allow an evidentiary hearing on a Rule 60(b) motion.

II. To Resolve the Conflict among the Lower Courts of whether they have Jurisdiction to grant a Rule 60(b) motion during an appeal.

The district courts have had no clear rule of law from this Court nor the Court of Appeals on the handling of a Rule 60(b) motion filed in their court during the pendency of an appeal, *Shepherd* 372 F.3d 332 n.6 (5th Cir. 2004). Although the Fifth Circuit demands a *motion for leave* by the district court before granting a Rule 60(b) via remand, *Shepherd* shows that the district courts in this circuit still do not follow Fifth Circuit precedent.

III. To Resolve, what this Court stated in Stone as to the district court's power to grant a Rule 60 motion during an appeal.

The Fifth Circuit in *Shepherd* at 332 has stated that the statement in *Stone* 115 S.Ct. 1537, 1547 (1995) "... *the pendency of an appeal does not effect the district court's power to grant Rule 60 relief.*" was dicta and should not be viewed as binding upon that court of appeals.

This statement in *Stone* also conflicts with this Court's decision in Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58 (1982) as to the effect of filing a notice of appeal.

IV. To correct the conflict between the Fifth Circuit and case law from this Court.

The Fifth Court's decision (App. A) is in conflict with this Court, in that, the bankruptcy court did not have jurisdiction to grant the Rule 60(b) motion filed during an appeal as per *Griggs* 459 U.S. 56, 58 (1982).

Absent any direction by the district court, sitting in its appellant role, to the bankruptcy court for further proceedings post-dismissal of that appeal (App. D), the Fifth Circuit's view of remand is misplaced and is contrary to this Court's ruling in Realty Acceptance Corporation v. Montgomery, 284 U.S. 547, 550-551 (1932) regarding the necessary statutory language of 28 U.S.C. § 2106, also see Heckler v. Mathews, 465 U.S. 728, 742 (1984).

The Fifth Circuit was aware that Respondent did not appeal the dismissal order (App. D) and it was the duty of the Fifth Circuit to announce that fact and order the lower courts to vacate their orders as moot, see United States v. Munsingwear, Inc., 340 U.S. 36, 40-41 (1950); also see Walling v. James V. Reuter, Inc., 321 U.S. 671, 677 (1944) and therefore contrary to decision(s) of this Court.

ARGUMENT

The Fifth Circuit misread the *Order Dismissing a Bankruptcy Appeal* and runs afoul of this Court's ruling in Realty Acceptance Corporation v. Montgomery, 284 U.S. 547, 550-551 (1932), in that the bankruptcy court vacated its own judgment without any instructions by the district court to do so (App. D).

The Fifth Circuit in *Shepherd* puts forth the necessary argument for this Court to understand the problems faced by the lower courts when a Rule 60(b) motion is filed before the completion of the appeals process. This confusion on how to proceed (or not) with a Rule 60(b) motion filed during the pendency of an appeal has split the court of appeals.

This new stance by the Fifth Circuit, in the case now before this Court, has so departed from the binding precedent of the Fifth Circuit as to spawn an even more divided court.

Not only has the Fifth Circuit ruled differently from other court of appeals on the subject of a Rule 60(b) motion filed during the pendency of an appeal, but has added a new wrinkle. That a trial court can just sit on a Rule 60(b) motion filed during an appeal and if the trial court is dissatisfied with the decision of the appellant court, then the trial court can grant the Rule 60(b) motion, as did the bankruptcy court in this case (App. E).

Respondent acquiesced to the *Order Dismissing a Bankruptcy Appeal* and did not avail itself of the remedy of an appeal and therefore the duty of the courts below was to announce this fact and order the bankruptcy court to vacate its order (App. E) as moot, as outlined by this Court in United States v. Munsingwear, Inc., 340 U.S. 36, 40-41 (1950); also see Walling v. James V. Reuter, Inc., 321 U.S. 671, 677 (1944).

The Fifth Circuit has attempted to rewrite 28 U.S.C. § 2106, *Heckler* 465 U.S. 742, by its ruling (App. A), in that, absent this statutory language in Appendix D, the bankruptcy court was without any power to act. Therefore, the Fifth Circuit's statement: "Here the case was remanded ..." (App. A page 4-5) is illusory at best and gives the appearance of manufacturing jurisdiction.

This Court is asked to invoke its supervisory powers to clear up among the lower courts whether or not a evidentiary hearing can be held on a Rule 60 (b) motion filed before the appeals process is completed and/or provide a uniform procedure on the handling of a Rule 60 (b) motion filed during the appeals process, as it stands now, its an appellant minefield out there and even when your Petitioner's followed the rules and laws we were threaten with sanctions (App. A, page 5).

Question No. 2 asked this Court if a Rule 60(b) motion should be handled in the same fashion as a motion under Rule 33 of the Fed. R. of Crim. P. as outlined in United States v. Cronic, 466 U.S. 648 footnote 42 (1984), the answer should be yes.

This Court has stated "...the practice of litigants under Rule 60(b) is, under our construction..." *Stone* 115 S.Ct. 1537, 1547 (1995). Therefore, in the interest of justice and providing uniformity among the inferior courts in the handling a Rule 60(b) motion, filed before the completion of the appeals process, it would be in the public interest to grant this writ of certiorari.

Lastly, Appendix D is void of any instruction(s) to the bankruptcy court, therefore the bankruptcy court acted without any authority prescribed by rule, statue or law.

CONCLUSION

Your Petitioner's respectfully request this Court to grant this their Writ of Certiorari and (1) direct the Fifth Circuit to withdraw and vacate its mandate (App. A), (2) that the Fifth Circuit instruct the district court to vacate its earlier order as moot (App. F) and (3) instruct the bankruptcy court to vacate its order (App. E) as moot and thereby upholding the unappealed order of the district court (App. D).

Respectfully submitted,

Leo Rogers Dugas

Leo Rogers Dugas, pro se
15311 Hummingbird
Baytown, TX 77520
Tel. 281-385-2319

INDEX TO APPENDICES

APPENDIX A	Unpublished, Decision of Fifth Circuit Case No. 04-40508
APPENDIX B	Unpublished, Order Denying Rehearing in Case No. 04-40508
APPENDIX C	Unpublished, Mandate of Fifth Circuit Case No. 98-40079
APPENDIX D	Unpublished, Order Dismissing A Bankruptcy Appeal
APPENDIX E	Unpublished, Order Granting Amended Motion of Claron Corporation for Relief from Judgment Pursuant to Bankruptcy Rule 9024 following Dismissal of Appeal by District Court.
APPENDIX F	Unpublished, Judgment of District Court Case No. 1:02-cv-679

FILED
OCT 19 2004

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-40508 Summary Calendar

In The Matter Of: LEO ROGERS DUGAS,

Debtor.

LEO ROGERS DUGAS; VALERIE DARLENE DUGAS

Appellants,

versus

CLARON CORP.,

Appellee.

Appeal from the United States District Court
For the Eastern District of Texas
(N0.1:02-cv-00679-RC)

Before GARZA, DeMOSS, and CLEMENT, Circuit Judges.

PER CURIAM:*

Before the Court is an appeal from the district court's order denying a motion to reopen the case and a request for relief pursuant to Fed.R.Civ. 60(b)(4). For the reasons that follow, we affirm the judgment order of the district court.

I. FACTS AND PROCEEDINGS

On August 24,2001, the United States Bankruptcy Court for the Eastern District of Texas ["bankruptcy court"] entered a sanctions order from which Claron Corporation ["Claron"] appealed. Claron moved for relief from judgment of the sanctions order. pursuant to Bankruptcy Rule 9024 [the "Rule 60(b) motion"]. On October 24,2001, the bankruptcy court conducted a hearing on this motion.

The bankruptcy court conducted the hearing pursuant to *Winchester v. United States Attorney for the Southern District of Texas,* 68 F.3d 947 (5th Cir. 1995), which acknowledges the jurisdiction of a trial court (in this case, a bankruptcy court), notwithstanding the prior filing of a notice of appeal, to "take action in aid of [an] appeal [before] the case is remanded to it by the appellate court.". *ld* at 949 (internal citations and quotations omitted). Following the hearing, on October 25, 2001, the bankruptcy court entered a notice of intent to grant, upon remand from the district court, Claron's Rule 60 (b) motion.

* Pursuant to 5th Cir. R. 47.5, the Court has determined that this opinion should not be published and is not binding precedent except under limited circumstances set forth in 5th Cir. R. 47.5.4.

1. The Sanctions order was styled; "Final Order Granting in Part and Denying in Part Debtor's Motion to Disgorge and Transfer of Funds Into the Registry of the Court and Awarding Damages for Willful Violations of the Automatic Stay."

On July 8, 2002, the district court transmitted to the bankruptcy court an order entered on May 28, 2002, dismissing Claron's appeal from the bankruptcy court. The bankruptcy court considered the order dismissing the appeal as authorization to proceed to grant the Rule 60(b) motion, and vacate the sanctions order, which it did on August 27, 2002. Appellants Leo and Valerie Dugas [the "Dugases"] appealed this order to the district court, asserting that the bankruptcy court had lacked jurisdiction to grant Claron's Rule 60(b) motion.

On July 24, 2003, the district court affirmed the bankruptcy court's order granting the Rule 60(b) motion. The matter was then remanded to the bankruptcy court for further proceedings. The Dugases filed in this Court a petition for a writ of mandamus, seeking immediate review of the district court's order, which was denied on December 3, 2003. The Dugases then moved the district court to reopen the case and requested relief pursuant to Rule 60(b) [the "second Rule 60(b) motion"] on March 8, 2004. The Dugases argued that the district court's July 24 order affirming the bankruptcy court's order was void, because the district court's May 28, 2002 order had divested the bankruptcy court of jurisdiction.

On April 13, 2004, the district court denied the second Rule 60(b) motion. The Dugases timely appeal from the April 13 order.

II. STANDARD OF REVIEW

We review a district court's decision to grant or deny relief under Rule 60(b) for an abuse of discretion. *See Anglin v. Local Union* 1351, *Int'l Longshoremen's Assn, 102* Fed. Appx. 367, 370 (5th Cir. 2004) (citing *New Hampshire Ins. Co. v. Martech USA, Inc.*, 993 F.2d 1195, 1200 (5th Cir. 1993)).

III. DISCUSSION

Appellants Leo and Valerie Dugas [the "Dugases"] argue that the district court's judgment affirming the decision of the bankruptcy court is void because it is contrary to this Court's decision in *Winchester v. United States Attorney for the Southern District of Texas,* 68 F.3d 947 (5th Cir. 1995). *Winchester* affirmed the proposition that once a party notices appeal, the district court is divested of jurisdiction except to "take action in aid of the appeal" or to correct clerical errors under Fed. R. Civ. P. 60(a). *Id* at 949. In *Winchester,* this Court examined the situation where a district court considers a Rule 60 (b) motion filed after a notice of appeal, and distinguished between a district court's denying such a motion, or granting it. *Id* While denying a Rule 60(b) motion is permissible as action in furtherance of the appeal, "'[w]hen the district court is inclined to grant the 60(b) motion, . . . then it is necessary to obtain the leave of the court of appeals. *Without obtaining leave, the district court is without jurisdiction, and cannot grant the motion.* ", *Id* (quoting *Travelers Ins. Co. v. Liljeberg Enters.,* 38 F.3d 1404, 1407 n.3 (5th Cir. 199)). n this case, the Dugases argue that under *Winchester,* the bankruptcy court was without jurisdiction to grant Claron's Rule 60(b) motion because the bankruptcy court did not "obtain leave" to grant the motion. They contend that therefore, the district court's July 24, 2003 affirming the bankruptcy court's order is void. The question whether the bankruptcy court obtained leave from the district court, however, is a red herring. *Winchester* explains that: "a notice of appeal divests the district court of jurisdiction' except to take action in aid of the appeal *until the case is remanded to it by the appellate court...*" *Id* (emphasis added). Here, the

case was remanded to the bankruptcy court when the district court dismissed the appeal on May 28, 2002. Consequently, the bankruptcy court incontrovertibly had jurisdiction to grant the Rule 60(b) motion.

As the district court correctly found, the Dugases' appeal is wholly without merit and, therefore, is DISMISSED as frivolous. *See* 5TH Cm. R. 42.2; *Howard* v: *King,* 707 F .2d 215,219-20 (5th Cir. 1983). The Dugases are cautioned that filing additional frivolous motions, suits, or appeals may result in the imposition of sanctions.

IV. CONCLUSION

For the foregoing reasons, the decision of the district court is AFFIRMED.

FILED
NOV 19 2004

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-40508
Summary Calendar

In The Matter Of: LEO ROGERS DUGAS,
Debtor.

LEO ROGERS DUGAS; VALERIE DARLENE DUGAS

Appellants,

versus

CLARON CORP.,

Appellee.

Appeal from the United States District Court
for the Eastern District of Texas
(No. 1:02-cv-00679-RC)

Before GARZA, DeMOSS, and CLEMENT, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is denied.

ENTERED FOR THE COURT:

"s/_____"
UNITED STATES CIRCUIT JUDGE

FILED
Mar 03 1999

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-40079

In The Matter Of: LEO ROGER DUGAS,

Debtor.

LEO ROGER DUGAS; VALERIE DARLENE DUGAS,
Appellants,

CLARON CORPORATION; CLAMONT ENERGY CORPORATION INC, formerly known as united States Texas Corporation Inc., formerly known as United Texas Petroleum Inc.,

Appellees.

Appeal from the United States District Court for the Eastern District of Texas (1:95-CV -1132)

Before KING, Chief Judge, and REAVLEY and BENAVIDES, Circuit Judges.

Debtors, Leo Roger Dugas and Valerie Darlene Dugas, appeal from an order of the district court affirming the bankruptcy court's denial of a disgorgement motion filed by the Dugas in their chapter 13 bankruptcy case. Unfortunately, neither of the appellees have assisted this Court by filing a brief responding to the issues raised by the Dugas on appeal. Upon consideration of the Dugas's brief and a review of the record, we reverse the district court and remand to the bankruptcy court for further proceedings.

BACKGROUND

The Dugas filed a petition for relief under chapter 13 of the Bankruptcy Code in the U.S. Bankruptcy Court for the Eastern District of Texas, Beaumont Division, on January 10, 1994. Nineteen months later, on August 22, 1995, the Dugas with the bankruptcy court. The motion alleged that one of the appellees Claron Corporation, had improperly removed-funds in which the Dugas's estate held an interest from the registry of the Harris County Civil Court at Law Number 2 in Harris County, Texas. The Dugas also alleged that the other appellee, Clamont Energy Corporation, had failed in its responsibility to protect the funds. The motion requested that Claron be ordered to turn over the removed funds to the Beaumont bankruptcy court and that the bankruptcy court take control over any similar funds remaining in the state court.

The funds that were the subject of the Dugas's were related to a well-traveled and procedurally complex interpleader action that had been filed in the Harris County court in December 1992. Originally styled *Howell Crude Oil Co.* v. *JSB Petroleum, Inc.,* Cause No. 611,156, that case involved numerous parties, including Claron and the Dugas, who claimed an ownership interest in oil and gas leases located in Chambers County, Texas. During the pendency of that action, the proceeds from those leases were being deposited into the registry of the Harris County court, awaiting the court's determination of which party owned them.

The leases that were the subject of *Howell* had originally been owned by Clamont Energy Corporation but had been transferred to other parties shortly before Clamont was forced into bankruptcy in 1989. As those transfers may have constituted avoidable preferences under 11 U.S.C. § 547, however, the Clamont. bankruptcy estate still held a potential claim to the leases when *Howell* was commenced. Based upon the Clamont estate's interest, one of the *Howell* defendants removed the case in May 1993 to the U.S. Bankruptcy Court for the Southern District of Texas, Houston Division. There, it was docketed as adversary proceeding number 93-4250 under the Clamont bankruptcy case.

Despite the Clamont estate's interest in the oil and gas leases, it had never been named as party to *Howell.* Therefore, in June 1993, Jason Searcy, the trustee for the Clamont bankruptcy estate, filed a complaint in the Beaumont bankruptcy court seeking to have all of Clamont's oil and gas lease transfers canceled, and the accumulated proceeds turned over the estate. Styled *Searcy* v. *J.S.B. Petroleum, Inc.,* that case was also docketed under the Clamont bankruptcy case, as adversary proceeding number 93-10315.

The Clamont estate's interest in *Howell* and *Searcy* was short-lived. In December 1993, Jason Searcy entered into settlement agreement with Claron through which Claron received all of the interest held by the Clamont estate in any of the disputed oil leases and the interplead funds. In exchange, Claron paid the estate $18,750. In February 1994, *Howell* was transferred to the Beaumont bankruptcy court and consolidated into *Searcy.* One day later, the court approved the settlement agreement in *Searcy,* thereby extinguishing all of the Clamont estate's remaining interest in both cases.

Although the settlement agreement ceded all of the Clamont estate's interest in the disputed leases and funds to Claron, it did not purport to resolve what interest Claron then held vis-a-vis the Dugas or any of the other original parties in *Howell.* In fact, because there still remained unresolved state law issues concerning the ownership over the leases and interplead funds, the Beaumont bankruptcy court, in May 1996, entered an order remanding *Searcy* to the Harris County court where *Howell* had begun four years previous.

The Dugas's disgorgement motion that is the subject of this case concerns the interplead oil and gas lease proceeds that were supposed to follow Howell, and then Searcy, as it shuffled through the string of state and federal courts. When Howell was removed to the Houston bankruptcy court in May 1993, all of the interplead oil and gas lease proceeds being held by the Harris County court, then totaling $25,866.85, were transferred from the registry of the Harris County court to the registry of the Houston bankruptcy court. Those funds, supplemented by other proceeds as they arose, traveled with the case and were eventually transferred back to the registry of the

Harris County court in May 1996 after the order of remand. Thus, from May 1993 when the case was removed until May 1996 when it was remanded, no more proceeds from the disputed leases should have been deposited into the registry of the Harris County court as the entire case was closed at the state level. The Harris County court's docket sheet reveals, however, that two deposits were made into its registry during that period. Both of those payments, one for $13,278.89 on June 3,1993, and the other for $23,716.43 on August 31,1993, were made by Statewide Crude, a company that had purchased oil under the disputed leases. Thus, a portion of the interplead funds traveled with the case in the federal bankruptcy courts while another portion improperly remained in the state court registry.

Among the evidence presented to the bankruptcy court by the Dugas' were copies of a court order and a payment authorization from the Harris County court that indicate that Claron received part of the mistakenly deposited Statewide Crude funds from the Harris County court in October 1994. The order, docketed under Howell's original state case number, 611,156, stated that it was "on the motion of Claron Corporation" and directed by the clerk of the Harris County court to pay Claron "$23,716.43 with accrued interest, held in the registry of the court." In describing the basis for this release of funds, the order found:

> The funds held in the Registry of the County Civil Court at Law No.1 are the property of Claron Corporation through the compromise and settlement agreement in Adversary Action under Case No.93-4250 [the Howell adversary proceeding] and the subsequent Trustee's Assignment of all of Clamont

> Energy Corporation's interest in and to Adversary Case No.93-4250 and any funds on deposit in the Registry of the Court in Adversary No.934250 and all related cases to Claron Corporation, Assignee.

The payment authorization indicates that a check for $24,658.33, which was the$23,716.43 with accrued interest, was issued to Claron by the registry of the Harris County court on October 14, 1994.

Although it was this removal of funds that formed the basis of the Dugas' disgorgement motion, that was not apparent on its face. In the motion, the Dugas asserted that a portion of their estate "consists of an interest in case # 611,156- and described that case's removal and docketing under the Clamont adversary proceedings. It then alleged that "Claron Corporation removed $24,658.33 . . . under adversary 93-1031. " Finally, it requested that the "court order Claron Corporation to disgorge the $24,658 plus accrued interest back into adversary 93-1031 . . . [and] ask[ed] the court to transfer remaining funds in Harris County to the registry of the court in Tyler, Texas under adversary 93-1031." Nowhere in their motion, however, do the Dugas indicate that the funds which they were concerned had been mistakenly deposited in the closed state proceeding.

During a short hearing, the bankruptcy court attempted to elicit a coherent description of the basis for the Dugas's motion. Although Mr. Dugas, representing himself pro se, was unsuccessful in concisely explaining his argument, he did manage to enter thirteen exhibits into evidence, including the Harris County court documents described above. Shortly after the hearing, the court

denied the motion in a one sentence order that found the Dugas had "totally failed to produce any evidence in support of the Motion."

On appeal of the bankruptcy court's order denying the disgorgement motion, the district court affirmed the bankruptcy court's ruling, but on different grounds. It found that, even if the Dugas had a basis for their motion, it was improper for them to have filed it in their personal chapter 13 bankruptcy case. According to the district court, the only place that the Dugas could have filed their disgorgement motion was in the *Searcy* adversary proceeding under the rights associated with the settlement agreement could litigated with notice to all interested parties.

The Dugas timely appealed the district's decision.

DISCUSSION

In reviewing a bankruptcy court's findings of fact and conclusions of law, we apply the same standard of review as the district court. *See Compuadd Corp.* v. *Texas Instruments Inc. (In re Compuadd Corp),* 137 F.3d 880, 881 (5th Cir. 1998). Finding of fact are reviewed for clear error and conclusions of law are reviewed de novo. *See id.*

We discern from the district court's silence as to the bankruptcy court's only asserted reason for denying the Dugas's disgorgement motion-that the Dugas "totally failed to produce in support of the motion" -at least a doubt, if not a rejection, of the basis for the bankruptcy court's ruling. It is clear to us that the Dugas did present the bankruptcy court with evidence relating to Claron's removal of funds from the registry of the Harris County court. Furthermore, based upon the facts that the case was closed at the state level when the removal occurred, and that the basis for the removal was a settlement agreement that did not purport to provide Claron with undisputed

rights to the funds removed, Claron's removal of the funds was ostensibly improper. Although it is possible that this evidence was not sufficient for the Dugas to have ultimately succeeded in forcing Claron to disgorge the funds it received it nonetheless did support their motion. The bankruptcy court's finding that the Dugas failed to produce any evidence was erroneous.

Neither do we agree with the district court's conclusion that the bankruptcy court's order can be affirmed on other grounds. Although it may well have been more efficient for the Dugas to have made their disgorgement motion in the *Howell* and *Searcy* adversary proceedings, we find, contrary to the district court's decision, that it was also permissible for the motion to have been made in their personal chapter 13 case.

Under the Bankruptcy Code's automatic stay provision, 11 U.S.C. § 362(a), Claron was prohibited from commencing, continuing, or taking any action to obtain or impair any property of the Dugas's estate during the pendency of their chapter 13 case. To the extent that Claron's removal of the funds from Harris County court illegally impaired the Dugas's interest to the same funds, that removal may have constituted a violation of the § 362(a) stay provisions. Moreover, the Dugas had standing to bring an action for stay violations. *See* 11 *U.S.C. § 362(h) Pettit v. Baker,* 876 F.2d 456,457-58 (5th Cir. 1989) {finding that § 362(h) provides a remedy for an individual injured by a willful violation of a § 362(a) stay). Thus, because the Dugas's disgorgement motion constitutes an action against Claron for violating the stay, it was properly brought before the bankruptcy court in their chapter 13 case.

The district court specifically rejected the Dugas's argument on appeal that their motion was a valid claim that Claron had violated the Dugas's chapter 13 stay. First, it found that this argument was not before it as it had not been properly raised in the bankruptcy court. Second, the district court found that even if it had been raised, the Dugas's argument lacked merit because the automatic stay does not operate against proceedings in the court which has jurisdiction over the bankrupt.

We find both of the district court's reasons rejecting the Dugas's argument unavailing. As to the first reason, we find that the Dugas did make this argument to the bankruptcy court and the district court should have found the argument properly raised. In the Dugas's motion to the bankruptcy court, they assert that "a portion of the debtors' estate consists of an interest in" the removed *Howell* case. They also listed the funds that had been interplead into that case and the funds that Claron had removed. Although the motion did not layout with specificity the Dugas statutory basis for seeking disgorgement of the funds removed by Claron, we find that a suit seeking relief from acts that impair the property of a bankruptcy estate is presumptively an action to enforce the automatic stay. On that basis, the Dugas's automatic stay argument was made to the bankruptcy court and thus was properly before the district court on appeal.

We also find unconvincing the district court's second argument, that Claron was not stayed from removing the funds held by the Harris County court because § 362(a) does not stay other proceedings in the same court that has jurisdiction over the bankrupt. While this Court has never considered whether proceedings before the court which has jurisdiction over the bankrupt are exempted from the ambit of the automatic stay, even if we were to join the courts from outside this circuit which

have so held, it would not affect our decision in this case. All of the decisions-cited by the district court merely state that the stay does not operate against the *court* where the bankruptcy case is pending. *See, e.g., Civic Center Square, Inc.* v. *Ford (In re Roxford Foods, Inc.), 12* F.3d 875, 878 (9th Cir. 1993) ("[t]he stay does not operate against the court with jurisdiction over the bankrupt'. *(quoting Teerlink* v. *Lambert (In re Teerlink Rancb Ltd),* 886 F.2d 1233, 1237 (9th Cir. 1989»); *In* re *Redburn, 193* B.R. 249, 260 n.17 (W.D.Mich. 1996) (citing cases for the proposition that "the creditor is not prohibited (by the automatic stay] from commencing or continuing actions in the bankruptcy court in which the bankruptcy is pending"). Here, the issue was whether the stay was violated when the Harris County court, a court unconnected to the bankruptcy court where the Dugas's case was pending, released funds to Claron. That the state court professed to release those funds on the basis of terms in a settlement agreement approved by the same bankruptcy court with jurisdiction over the Dugas does not exempt the state court or Claron from the reaches of the stay in the Dugas's bankruptcy case. We are moreover troubled that these funds were released to Claron given that neither the settlement agreement nor any other determination of the bankruptcy court appeared to extinguish or resolve the Dugas's claimed interest to the same funds.

We thus find that it was an error for the bankruptcy court motion to have failed to reach the merits of the Dugas's disgorgement motion. We remand to the bankruptcy court for further proceedings consistent with this decision.

REVERSED AND REMANDED

EOD
May 30, 2002

IN THE UNITED STATED DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

CLARON CORPORATION	§	
	§	
Appellant	§	
	§	CIVIL ACTION
v.	§	No. 1:01-cv-681 (TH)
	§	
LEO ROGERS DUGAS and	§	BANKRUPTCY
VALERIE DARLENE	§	ACTION
DUGAS	§	No. 94-10027
	§	
Appellees.	§	

ORDER DISMISSING BANKRUPTCY APPEAL

Before the Court is a *Motion to Remand a Bankruptcy Appeal* [Clerk's Docket No. 13] (which the Court will construe as a motion as a motion to voluntarily dismiss appeal) filed by the appellant Claron Corporation on November 8, 2001. Having considered the motion and response, and having considered appellee's *Motion to Dismiss Appeal* [Clerk's Docket No.1], the Court is of the opinion that the appeal should be dismissed.

IT IS THEREFORE ORDERED that the *Motion to Remand a Bankruptcy Appeal* [Clerk's Docket No. 13] (which the Court will construe as a motion as a motion to voluntarily dismiss appeal) is in all things **GRANTED.**

IT IS FURTHER ORDERED that Claron's Corporation's appeal from the bankruptcy court is hereby **Dismissed.**

IT IS FURTHER ORDERED that the clerk is **DIRECTED** to close this appellate case file.

SO ORDERED.

SIGNED this the 28th day of May, 2002.

"s/_____
Thad Heartfield
US District Judge

EOD
AUG 27 2002

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN OF TEXAS
BEAUMONT DIVISION

IN RE:		
LEO ROGERS DUGAS and	§	
VALERIE DARLENE DUGAS	§	Case No. 94-10027
	§	
Debtors	§	Chapter 13

ORDER GRANTING AMENDED MOTION OF CLARON CORPORATION FOR RELIEF FROM JUDGMENT PURSUANT TO BANKRUPTCY RULE 9024 FOLLOWING DISMISSAL OF APPEAL BY DISTRICT COURT

ON THIS DATE the Court reviewed the file in the above-referenced case. The Court finds that on October 24, 2001, this Court conducted a hearing upon the "Amended Motion of Claron Corporation for Relief from Judgment Pursuant to Bankruptcy Rule 9024" (the "Rule 60(b) Motion") filed by the Claron Corporation. Because that motion was brought subsequent to the filing of a notice of appeal by the Claron Corporation of that certain "Final Order Granting in Part and Denying in Part Debtor's Motion to Disgorge and Transfer of Funds Into the Registry of the Court and Awarding Damages for Willful Violations of the Automatic Stay" (the "Sanctions Order") entered by this Court in the above-referenced case on August 24, 2001, the Court conducted the hearing on the Rule 60(b) motion pursuant to the authority

and procedure outlined in *Winchester v. United States Attorney,* 68 F.3d 947 (5th Cir. 1995) and *In re Fraser,* 98 F.Supp.2d 788 (E.D. Tex. 2000) which affirms the jurisdiction of a trial court, notwithstanding the prior filing of a notice of appeal, to conduct a hearing and *deny* a subsequent Rule 60(b) motion, it is necessary to obtain leave of the appellate court and, without the granting of such leave, usually through the remand of the action, the trial court is without jurisdiction to grant the motion. Accordingly this Court entered on October 25, 2001, a "Notice of Intent to Grant Upon Remand Amended Motion of Claron Corporation for Relief from Judgment Pursuant to Bankruptcy Rule 9024" (the "Notice of Intent") which provided that "an order granting the Motion [for Relief from Judgment] shall be entered by this Court upon notice of the remand of the appeal regarding the Sanctions Order by the United States District Court for the Eastern District of Texas to this Court or upon the granting of such other leave as the appellate court may find appropriate."

This Court finds that, on July 8, 2002, the United States District Court transmitted to this Court an "Order Dismissing a Bankruptcy Appeal" which now authorizes this Court to proceed to grant the Rule 60(b) motion as indicated by the Notice of Intent. Accordingly, based upon the Notice of Intent issued upon due consideration of the evidence admitted at the hearing conducted on October 24, 2002, the Court finds that just cause exists for the entry of the following order.

IT IS THEREFORE ORDERED that the "Amended Motion of Claron Corporation for Relief from Judgment Pursuant to Bankruptcy Rule 9024" file by the Claron Corporation is hereby **GRANTED** and that certain "Final Order Granting in Part and Denying in Part Debtor's Motion to Disgorge and Transfer of Funds Into the Registry of the Court and Awarding Damages for Willful Violations of the Automatic Stay, "entered by this Court in the above referenced case on August 24, 2001, is hereby **VACATED.**

IT IS FURTHER ORDERED that the "Motion to Disgorge and Transfer Funds into the Registry of the Court" filed by the discharged Debtor, Leo Rogers Dugas, shall be reset for further hearing under the Court's procedures with notice to all affected parties.

DATED AUG 22, 2002.

"s/_____"
BILL PARKER
US BANKRUPTCY JUDGE

EOD
JUL 28 2003

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

LEO AND VALERIE DUGAS	§	Case No.1:02-cv-679
	§	
Appellants,	§	Appeal from
	§	Bankruptcy Case
CLARON CORPORATION, INC.	§	No. 94-10027
	§	
Appellee.	§	Judge Ron Clark

JUDGMENT

This case came before the Court, Honorable Ron Clark, District Judge, presiding, on appeal from the United States Bankruptcy Court for the Eastern District of Texas, Honorable Bill Parker, Bankruptcy Judge, presiding. The Court, having duly considered the issues and arguments presented, and a decision having been duly rendered, it is:

Pursuant to 5th Cir. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the listed circumstances set forth in 5th Cir. R. 47.5.4.

ORDERED and **ADJUDGED** that The Bankruptcy Court's "Order Granting Amended Motion Of Claron Corporation For Relief From Judgment Pursuant To Bankruptcy Rule 9024 Following Dismissal Of Appeal By District Court," [Docket. #220] is AFFIRMED, and the matter is remanded to the Bankruptcy Court for further proceedings.

SIGNED this 27th day of July, 2003.

"s/_____"
Ron Clark
US District Judge

(2)

Supreme Court, U.S.
FILED
JUN 9 - 2005
OFFICE OF THE CLERK

No. 04-1180

IN THE

SUPREME COURT of the UNITED STATES

LEO ROGERS DUGAS

Petitioner

V.

CLARON CORPORATION, INC.

Respondent

PETITION FOR REHEARING

Leo Rogers Dugas, pro se
15311 Hummingbird Lane
Baytown, TX 77520
Tel. (281) 385-2319

Petition for Rehearing

NOW COMES, Petitioners and respectfully request the Court to reconsider its decision not to grant their Petition for Writ of Certiorari and would show the Court the following:

That Respondent invoked the jurisdiction of the district court when Respondent perfected its appeal pursuant to 28 U.S.C. § 158(a), seeking to appeal the August 24, 2001 judgment against it.

That Respondent sought *remand* to the bankruptcy court during its perfected appeal.

That Respondent's request for *remand* was deemed a *voluntary motion to dismiss appeal* and was granted as such by the district court, see **ORDER DISMISSING BANKRUPTCY APPEAL** (App. D page 1-2, original petition for writ of certiorari).

That absent *remand,* Respondent's only legal avenue to challenge the **ORDER DISMISSING BANKRUPTCY APPEAL** was an appeal pursuant to 28 U.S.C. § 158(d).

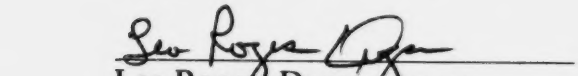
That Respondent chose not to appeal the **ORDER DISMISSING BANKRUPTCY APPEAL.**

Therefore, ***as a matter of law*** the August 24, 2001 judgment in favor of Petitioners that Respondent appealed from remains unaffected by subsequent acts of other courts.

Prayer

For these reasons Petitioners respectfully request that the Court recognize the legal position of the Petitioner's judgment against Respondent, subsequent to Respondent's *voluntary dismissal of its appeal* of the August 24, 2001 judgment, thereby upholding the laws of the United States.

Respectfully submitted,



Leo Rogers Dugas, pro se
15311 Hummingbird
Baytown, TX 77520
Tel. 281.385.2319

SUPREME COURT RULE 44 CERTIFICATE

I, Leo Rogers Dugas, do hereby certify that the Petition for Rehearing is presented in good faith and not for delay. This Court's ruling in *Griggs* 459 U.S. 56, 58-61 (1982) stands now as bar to a different position by this Court as to the bankruptcy court's jurisdiction "over the aspects of the case" during an appeal from that court, it had none. Further, 28 U.S.C. § 158(d) was the only avenue left for Respondent when the district court construed Respondent's motion for remand as a motion to voluntarily dismiss appeal. Absent remand by the district court, neither case law nor the laws of the United States provides for a bankruptcy court to *sua sponte* vacate its own judgment once the appeal from that court had been voluntarily dismissed by the appellant, as in this case before the Court.

Because this writer believes that the law should work for all and all of the time, that I have in good faith, filed my Petition for Rehearing.

Respectfully submitted,

Leo Rogers Dugas

Leo Rogers Dugas, pro se